EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Sikorska	**v**	**Brook Street UK Ltd**

Heard at: Watford **On**: 13 January 2021

Before: Employment Judge R Lewis

Appearances

For the Claimant: In person
For the Respondent: Mr T Perry, Counsel

JUDGMENT

1. The respondent has made an unlawful deduction and is ordered to pay to the claimant £170.56 in respect of unlawful deduction.

REASONS

1. The claimant asked for written reasons after I had given judgment.

Procedural history

2. This was a straightforward claim with a tangled procedural history which I summarise as follows.

3. The claim was presented on 5 August 2018. Day A was 12 June and Day B was 12 July.

4. It was served by the tribunal at the respondent's address at 374 Station Road, Harrow, which was given at box 2.2 of the ET1. No response was received and on 13 February 2019 Employment Judge Henry conducted a hearing attended by the claimant only and issued judgment in the sum of £1,018.82.

5. The tribunal heard from the respondent's solicitors on 27 June 2019, and on 8 July they applied for reconsideration.

6. The reconsideration application stated that the 374 Station Road address had closed on 10 August 2018, and that the claimant and others had been informed of a different contact address. The respondent then summarised its reply to the merits.

7. Judge Henry allowed an extension of time for the application to be made, and the claimant was afforded the opportunity to reply to it. By judgment sent on 15 April 2020 Judge Henry set aside his judgment. The notice of this hearing was sent to the parties on 31 May 2020 and shortly before the hearing the parties were informed that the hearing would be conducted by CVP.

8. The respondent provided a bundle of about 90 pages. Before the start of the hearing, I read the material parts of the bundle. The issue seemed to me very straightforward, and I was concerned not to be diverted by disputes about the reconsideration issue.

9. I therefore at the start of the hearing informed the parties that it did not seem to me that oral evidence was necessary, as the matter was adequately documented. I summarised an approach which seemed to me how the matter presented. I then adjourned for 15 minutes before hearing submissions. The parties were concise and focussed in their submissions. Although the burden of proof was on the claimant, I heard from Mr Perry first, so that the litigant in person would have the opportunity to reply. I then gave judgment.

Legal framework

10. At the time the claim was presented, the claimant was an employee of the respondent, provided as an agency worker to the Ministry of Justice. Her claim was for unlawful deductions only, therefore brought under s.13 Employment Rights Act 1996 which states: “An employer shall not make a deduction from wages of a worker employed by him unless…”. S.27 defines the word “wages” as “any sums payable to the worker in connection with his employment.”

Findings

11. On 31 January 2018 the claimant signed the respondent’s terms and conditions for temporary employees (70-76). The terms state:

    “This document, together with such Brook Street assignment letters as may be issued to you from time to time, constitutes your contract of employment.”

12. At section 1.3 the terms set out what a letter of assignment might contain. Section 7.2 (72) required the respondent to give two weeks notice after four weeks employment.

13. On 1st February, the claimant emailed Ms Gemma Malcolm of the respondent and asked for written confirmation of her hourly rate, and the rate to which her pay would increase after 12 weeks. She understood that

as an agency worker she would work for 12 weeks at NMW rate, and then on a comparable rate with colleagues.

14. Minutes later Ms Malcolm replied (32), in an email which was at the heart of the case:

"You will receive all this confirmation before you start your booking. I can confirm you will go in at £7.65 ph/£11.48 ph after twelve weeks."

15. The claimant was sent an assignment letter on Thursday 15 February. The subject heading was "Temporary Assignment Confirmation". It gave details of the job and location. The only reference to pay was: "The remuneration will be £7.65 ph and paid weekly in arrears." (78)

16. The claimant started work at Uxbridge County Court the following day, Friday 16 February 2018; she knew that 12 weeks would expire on Friday 11 May, after which her pay would increase.

17. On 10 May she received an email headed "Temporary Assignment Confirmation" (79) stating:

"We are writing to inform you of a change of your remuneration in accordance with the AWR legislation… Your remuneration will increase to £10.66 ph, paid weekly in arrears."

18. The increase was backdated to the previous Monday, 7 May, but nothing turns on that point. Likewise, nothing turns on the reason for the discrepancy, which I understand to be a mistaken understanding of the earnings of the directly employed comparators.

19. Upon receipt of that email the claimant knew that she had been given two conflicting pieces of information: that by 11 May her pay would increase to £10.66 per hour or £11.48 per hour. She knew that she had agreed to the higher figure, but she did not know the reason for the discrepancy.

20. The claimant took up the point in email correspondence. The correspondence concluded with Ms Talbot, Branch Manager, on 5 June informing her: "We are truly sorry we made a genuine error." Ms Talbot confirmed that the rate was and would remain £10.66 (although I do not need to deal with the point, she also referred to the claimant having in fact been offered a higher rate post, which she had turned down).

21. On 12 June the claimant replied:

"From our conversation and emails received both from Emma and yourself I understand the rate per hour will not be corrected. In this case I would have to take this matter higher."

Discussion

22. Mr Perry's first submission was that the letters of assignment did not contain the hourly rate of £11.48. The letters of assignment stated first the rate of

£7.65 and then £10.66. As the claimant had been properly paid at that rate her claim must fail altogether. His second submission was that if I were to find that the claimant was to have been paid £11.48 per hour, she was given notice of a change on 10 May, which came into force after two weeks (73) and therefore limited her claim to hours up to 24 May, calculated by the respondent as 111 hours difference at 82p per hour, ie £91.02.

23. His further alternative submission was that which I had suggested as a provisional view at the start of the day, namely that notice was given on 5 June, and therefore the claimant was entitled to the difference in hourly rate between 7 May and 19 June, shown on the respondent's timesheets to be 208 hours and the figure of £170.56.

24. The claimant's submission was that she had never agreed to a figure of £10.66 per hour; and she was entitled to the higher rate up to 28 December 2018. (On 13 February 2019 Judge henry had given her permission to amend her claim to cover losses up to that date). I was concerned by a possible fourth alternative, which was that the cut off date for the increase was 5 August 2018, the date of presentation of this ET1; a fifth alternative (not put forward by either side) would have been the date in mid-February 2019, when the claimant ceased to work for the respondent.

Conclusions

25. When the claimant started employment, it was agreed that by 12 May 2018, her pay would increase to £11.48 per hour. I accept that that was a mistake by Ms Malcolm. I also accept that the claimant was entitled to rely upon it, and that any error or ambiguity is to be construed in her favour and against the respondent. While I accept that the rate of £11.48 does not appear in any document called or headed 'Assignment,' it seems to me right that the prejudice caused by Ms Malcolm's error should fall on the respondent.

26. I also find that the respondent was entitled to give notice to correct the mistake. I do not agree that it did so on 10 May. The claimant was correctly entitled to probe the question of a possible mistake. However, by 5 June she was left in no doubt that the respondent's final position was that the correct figure was £10.66 and she would be paid that figure. It is clear from her email of 12 June that she understood that that was the final position.

27. My conclusion therefore is that between 7 May, when the claimant's pay increased, and 19 June, expiry of two weeks from 5 June, the claimant was properly entitled to be paid £11.48 per hour. She has been paid £10.66 per hour. The claimant had no information or evidence to challenge the respondent's calculation of 208 hours, which is therefore the basis of the above figure.

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Employment Judge R Lewis

Date:26/1/21
Sent to the parties on: .....

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For the Tribunal Office